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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1041

SAMUEL A. KAUFER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF AFFIRMANCE OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Samuel A. Kaufer, hereby petitions for rehearing of this Court's affirmance on April 1, 1969 of the order of the United States Court of Appeals for the Second Circuit, which had affirmed the denial of post-conviction relief sought on the basis of warrantless electronic eavesdropping.

In affirming, this Court cited only its March 24, 1969 decision in *Desist* v. *United States,* 394 U. S. ——, which had held that *Katz* v. *United States,* 389 U. S. 347, was "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967 [the date of the *Katz* decision]." Six days after granting certiorari and summarily affirming in the case at bar—where the electronic surveillance was conducted prior to December 18, 1967—this Court on April 7, 1969 granted review in *United*

States v. *White*, 394 U. S. ——, where the electronic eavesdropping also occurred prior to December 18, 1967.

The only apparent explanation for the fact that this Court did not see fit to reverse summarily in *White*, as suggested by the Government therein (Petition, p. 6), seems to be that neither *Katz* nor *Desist* disposed of the question of the constitutionality of warrantless electronic eavesdropping where one party to the conversation had consented thereto. If this was the basis for this Court's action in *White*, then, since the Government has already conceded herein that the issues in *White* and the case at bar are identical (Memorandum for the United States, pp. 3-4),[1] petitioner should be afforded the same full hearing by this Court as have the parties in *White*. There would be no problem of retroactivity in *White* should the defendant there establish for the first time that such eavesdropping is unconstitutional (*Desist* v. *United States, supra*, n. 24); there would likewise be no problem of retroactivity for petitioner, identically situated.

CONCLUSION

Petition for rehearing of the judgment of affirmance should be granted, and this cause set down for argument with the argument in *White*.

Respectfully submitted,

FREDERICK H. BLOCK
and
HERBERT MONTE LEVY,
Attorneys for Petitioner.

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[1] While the informer in *White* did not testify, the fruits of electronic eavesdropping corroborated the testimony of an agent who heard and observed significant conversations and actions. Here, too, the fruits of electronic eavesdropping corroborated the agent's testimony.

Certificate of Counsel.

HERBERT MONTE LEVY, one of counsel for petitioner Samuel A. Kaufer, hereby certifies, pursuant to Rule 58(1) of the Rules of this Court, that the above petition for rehearing is presented in good faith and not for delay.

HERBERT MONTE LEVY.